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must be first well defined, and when it is written, the writing corrects the inaccuracies of the memory. But it cannot exclude oral testimony, for this must be admitted, at least to show performance, satisfaction or payment, in discharge of the contract; and here fraud may be practised. The law does not expect ever to exclude frauds entirely. Before it can succeed in doing so, it must repress all business and all freedom of action. We cannot by legislation make people either accurate or honest. Even a written contract may be tainted with fraud and that must be exposed. It may contain an error or omission, and that must be proved. If we refuse either, we encourage fraud. If we allow either, we open a door by which fraud may enter in the very face of the Court and by its aid. What shall we do? The law in its wise experience declares, that by refusing to hear evidence of fraud and mistake against a written contract, there is more encouragement given to fraud than by receiving it; for dishonest men alone commit frauds and refuse the correction of mistakes; and frauds are much more apt to be committed against confiding honesty, in a private transaction, than against the awakened suspicion of a judicial tribunal.

Here a mistake is alleged and corrected by the plaintiff, and the true question is, has the mistake been proved and the correction rightly made? and the jury have answered that it has. The plaintiff gained nothing by making the correction himself, and did not seek to. It was indiscreet in him to make the correction, but he did no wrong by it, and should not suffer for it.

For these reasons we think that this judgment should be affirmed.

Judgment reversed.

In the Court of Common Pleas of Perry County, Pennsylvania.

CASSEL vs. HERRON & PATTERSON.

1. The concealment of a known defect in a horse, not within the reach of observation by the vendee, and not made known to him at the sale, such as glanders, which, by reason of powders administered by the vendor, had assumed a latent form, will avoid the contract.

2. Where a promissory note had been given for the purchase money, for a diseased and worthless mare, the conduct of the holder of the note having misled the buyer into the purchase, *held*, that the consideration had failed, and no recovery could be had on the note.

This was an action of debt, founded upon a promissory note. The defendants alleged a failure of the consideration. The case was tried, and verdict rendered for defendants, and the following opinion, in which the facts of the cause are sufficiently stated for a proper understanding of it, delivered on a motion for a new trial made by the plaintiff.

The opinion of the Court was delivered by

GRAHAM, P. J.—The plaintiff asks for a new trial on the ground of misdirection by the Court in instructing the jury, that if they believed that at the time of the purchase of the mare, which was the consideration of the note on which the suit was brought, she was diseased and of no value, which was known to the plaintiff, that the fact was not made known by Cassel to the defendants, and that the diseased condition of the mare could not be discovered at the time of the purchase, then their verdict should be for the defendants.

The evidence in this case shows that the mare was *glandered*, a disease the witnesses considered incurable, and all the witnesses, examined on that point, concurred in saying that she was of no value. It was further proved, that when the mare was permitted to rest for some time without labor, and powders were administered by Cassel, the disease assumed a latent form, not discoverable.

The question then presented is, will the concealment of a known defect, not within the reach of the observation of one of the contracting parties, avoid the contract.

Although it is said by legal commentators, “that human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction,” and Pothier considers some of the rules of morality laid down by Cicero, “as being of too severe and elevated a character for practical application, or the cognizance of human tribunals.” Yet we are pleased to discover, on a reference to the law applicable to this case, that

the immorality of this transaction is not of so refined and elevated a character as to soar above "the cognizance of human tribunals."

A fraud may be perpetrated, which will vitiate a contract, as well by a *suppressio veri*, as by an *expressio falsi*. "Fraudulent representation, or concealment of material circumstances, vitiates all contracts." 1 Comyn on Contracts, 35.

"Fraud more clearly occurs, where one person substantially misrepresents or *conceals* a material fact precisely within his own knowledge, in consequence of which a delusion exists; or uses a device naturally calculated to lull the suspicions of a careful man, and induce him to forego inquiry into a matter upon which the other party has information, although such information be not exclusively within his reach." Chit. on Con. 7th American Ed. 681-2.

"In England, the buyer is his own merchant, and has no implied warranty to rely on, unless there be a distinct usage in the trade, or a *latent fault known to the seller, and fraudulently concealed*, or the condition of the thing misrepresented." Bell's Contract of Sale, 161—50 Law Lib.

"If there be an intentional concealment or suppression of material facts in making a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract. 2 Kent's Com. 482.

The same commentator, with his usual clearness and precision of language, thus states the rule on page 485. "The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience, with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars, which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects, which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of atten-

tion to these points, where attention would be sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply." "And if the vendor be wanting in good faith, *fides servanda* is a rule equally enforced at law and in equity."

Thus we find the law in the different text writers to which we have referred, which has been adopted by our Courts generally in the different states.

In *Dixon vs. McClutchay*, Addison Reports, 323, the Court say : "A man who sells a horse to another, knowing a material defect, which, in equity and good conscience, he ought to disclose, and does not ; if it be not known to the buyer, or such as a buyer of common prudence must be presumed to know ; this is such a fraud as vitiates the contract, and the buyer may call for his money again."

In *Kimmel vs. Lichty*, 3 Yeates, 262, the Court stated the law to be : "If one sells an unsound horse knowingly, and conceals the circumstances, and receives a sound price, he is answerable in damages for the deceit."

In *McDowell vs. Burd*, 6 Binney, 198, the sale of a negro slave, even without warranty, knowing that he was affected with a disease which greatly injured him, and *concealing* that circumstance from the purchaser, was adjudged a good defence to an action brought to recover the price.

In *Light vs. Stoevers Exr.* 12 S. & R. 432, in an action on a bond given for the purchase of a mill and farm, defendant was permitted to prove that the dam caused the water to overflow the lands of another, which was known to plaintiff, and concealed from defendant, and therefore it would be against equity to insist on the payment of the whole of the purchase money.

The same principle is recognized in the recent case of *Price vs. Lewis*, 5 Harris, 51 and 54. That the misconduct of the plaintiff, in the wilful suppression of a material fact, known only to him, furnished an equitable defence.

So also are the decisions of the Courts in New York and Massachusetts. See *Fleming vs. Slocum*, 18 Johnson Rep. 403 ; *Allen vs. Addington*, 7 Wendell, 9 ; *Bliss vs. Thompson*, 4 Mass. R. 491.

The case of *McFarland vs. Newman*, 9 Watts, 55, relied upon

by plaintiff's counsel, was an action of assumpsit upon an alleged warranty, in which the Court held, that the naked averment of a fact, is neither a warranty, nor the evidence of it, and the plaintiff's remedy was an action for the deceit.

The motion for a new trial is over-ruled, and judgment directed to be entered on the verdict by the Court.

In the Court of Common Pleas of Ohio, May Term, 1853.

BOWEN & MCNAMEE, *vs.* THE LAKE ERIE TELEGRAPH COMPANY.

Telegraph Companies holding themselves out to transmit despatches correctly, are bound so to do, or respond in damages, unless the causes of failure are beyond their control.

This was an action brought by the plaintiffs, to recover of the defendant, damages sustained by reason of a mistake in the transmission of a telegraphic despatch sent over the line of the defendants, from Monroe, Michigan, to Buffalo, New York, Nov. 25th, 1850. The despatch was as follows :

“Send one handsome eight dollar blue and orange, and twenty-four red and green, three twenty-fives, Bay State. Fill former orders with best high colors you can.”

(Signed,)

Bidwell & Co., Adrian, Michigan.

To Bowen & McNamee, New York.

The proof was that the despatch, when it reached New York, read “one hundred,” instead of “one handsome,” and that the mistake complained of occurred in some office upon the defendants' line. That the plaintiffs, after having had the despatch repeated, (how far back did not appear,) and receiving it a second time, “one hundred,” shipped to Bidwell & Co., “one hundred eight dollar blue and orange Bay State” shawls ; that the shawls were returned, and reached New York after the shawl season had closed ; by reason of which, they were depreciated in value.

The plaintiffs claimed to recover charges for freight and the depreciation in value.